Supreme Court, U.S.
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NO. 02-524

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

KURT JONES,

Petitioner,

v.

DUYONN ANDRE VINCENT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT IN SUPPORT OF MOTION

STATE APPELLATE DEFENDER OFFICE

BY: David A. Moran
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25 pp

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Respondent Duyonn Andre Vincent respectfully asks this Honorable Court for leave to proceed *in forma pauperis* so that he may file the accompanying Brief in Opposition to Petition for Writ of Certiorari with this Court.

Respondent had been found by the state trial court to be indigent for purposes of state appellate proceedings, was appointed counsel for that purpose, and is represented in this Court by that appointed counsel. As his affidavit indicates, Respondent is currently incarcerated in a state prison and is not receiving any income.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

DAVID A. MORAN
(Counsel of Record)
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

Dated: October 8, 2002

Counsel for Respondent

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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Duyonn Andre Vincent, being first duly sworn, depose and say that I am the Respondent in the above-entitled case and that because of my poverty I am unable to pay the costs associated with defending in this Court the judgment of the United States Court of Appeals for the Sixth Circuit.

I further swear that the responses which I make below relating to my ability to pay the costs of defending this appeal are true:

1. Are you presently employed? NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

_____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2-2002 32.58 ~~week~~ Month/4

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any question in this affidavit will subject me to the penalties for perjury.

DUYONN ANDRE VINCENT

Subscribed and sworn to before me
this 10 day of Sep, 2002.

Angela L Curtis

Notary Public, _____ County, Michigan
My Commission Expires: _____

ANGELA L CURTIS
NOTARY PUBLIC GENESEE CO., MI
MY COMMISSION EXPIRES May 15, 2008
ACTING IN LAPEER COUNTY, MI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATE APPELLATE DEFENDER OFFICE

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COUNTER-STATEMENT OF THE CASE

Proceedings in the State Trial Court

Respondent Duyonn Andre Vincent and two other men were tried together in the Genesee County (Michigan) Circuit Court on, among other counts, first-degree premeditated murder. After the prosecution's case concluded on March 31, 1992, all three defendants moved for a directed verdict on the first-degree murder charge on the ground that there was insufficient evidence of premeditation. The trial judge granted the directed verdict motion:

> Nothing else? Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different than anyone else as I hear the comment made by Mr. Doll about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgement was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

Vincent v. Jones, 292 F.3d 506, 508 (6th Cir. 2002) (quoting trial judge) (3a).

The trial court's official docket entries for March 31, 1992, reflect the grant of the directed verdict and reduction of the charge to second-degree murder:

> MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER TO 2ND DEGREE MURDER.

Id., 292 F.3d at 512 (quoting trial court docket entries) (12a).

The following day, April 1, 1992, the prosecutor renewed his argument against the grant of the directed verdict. After Respondent's attorney argued that the Double Jeopardy Clause would prohibit reconsideration of the grant of the directed verdict, the trial judge stated:

> Do you really believe that? You think that when a decision is made that before it's recited to the parties who are directly involved in it and particularly the jury because we're asking now for the jury to not consider certain factors that might be brought to them, that a Court cannot consider what it has done? I don't know that that's right. I, I consider things in great length and I, I try to be an open person, I try to give everybody an opportunity to talk and say anything they want. And I'm not, I'm not a stick in the mud. I just don't stick there and say "well, that's where I am." I try to be open about things and flexible.

Id., 292 F.3d at 508 (quoting trial judge) (4a).

After counsel for one of the codefendants joined in Respondent's double jeopardy argument, the judge responded:

> THE COURT: You think double jeopardy has anything to do with this?
>
> MS. CUMMINGS: Yes. I believe once you've directed. A verdict--
>
> THE COURT: Why is that?
>
> MS. CUMMINGS: A verdict that that's---
>
> THE COURT: I haven't directed a verdict to anybody.
>
> MS. CUMMINGS: You granted our motion.
>
> THE COURT: Oh, I granted a motion but I have not directed a verdict.

Id., 292 F.3d at 508-509 (quoting trial colloquy) (4a-5a). The trial court then took the matter under advisement.

On April 2, 1992, two days after granting the motion for directed verdict and one day after hearing Respondent testify and present his defense case, the trial court announced, "I've reconsidered the ruling that the Court earlier made and I've decided to let the jury make its own determination on the Degrees." *Id.*, 292 F.3d at 509 (quoting trial judge) (5a).

The next day, April 3, 1992, Respondent was convicted of first-degree premeditated murder. He was then sentenced to the mandatory term of life imprisonment without parole.

Proceedings on Direct Appeal

On his direct appeal of right, the Michigan Court of Appeals unanimously reversed Respondent's first-degree murder conviction and remanded to the trial court for entry of a second-degree murder conviction and a resentencing on that reduced charge. *People v. Vincent*, 546 N.W.2d 662 (Mich. Ct. App. 1996) (14a). The Michigan Court of Appeals explained that the trial court's decision to reverse itself and allow further factfinding on the first-degree murder count was contrary to *Smalis v. Pennsylvania*, 476 U.S. 140 (1986):

> In *Smalis v. Pennsylvania*, the Supreme Court reiterated that a trial court's determination that the evidence is insufficient to convict is an acquittal under the Double Jeopardy Clause and that the Double Jeopardy Clause bars subjecting a defendant to post-acquittal fact-finding proceedings going to the guilt or innocence regarding such a charge. As explained below, we are convinced that the court granted a directed verdict of acquittal to defendant regarding the first-degree murder charge and that the court's subsequent reversal of its decision resulted in post-acquittal fact-finding by the jury when the jury was allowed to consider the first-degree murder charge in violation of defendant's double jeopardy rights.

Vincent, 546 N.W.2d at 665-666 (19a).

The Michigan Court of Appeals rejected the claim that Respondent had not been acquitted:

> We reject any suggestion that the trial court did not actually direct a verdict of acquittal as to the first-degree murder charge after hearing the arguments of counsel. While the court's words "Well, my impression at this time" may be somewhat ambiguous, the court's following statement: "What we have at the very best is second-degree murder," is not ambiguous. The next morning, the judge acknowledged he had granted the motions for directed verdict. In deciding to reserve ruling, the court referred to the "ruling" it had made earlier, and in submitting the first-degree murder charge to the jury, the court said it had reconsidered the "ruling" it had previously made.

Id., 546 N.W.2d at 667 (22a-23a).

The Michigan Court of Appeals therefore concluded that the trial court had violated Respondent's Double Jeopardy Clause rights by submitting the first-degree murder charge to the jury:

> The court made a ruling that it later reconsidered. However, once the court rendered its ruling on the record directing a verdict of acquittal on the first-degree murder charge, double jeopardy principles forbade it from changing its mind and allowing the jury to consider a first-degree murder charge. The court's reversal of its directed verdict resulted in further proceedings where the jury resolved factual issues going to the elements of first-degree murder contrary to defendant's right not to be placed twice in jeopardy regarding the first-degree murder charge. *Smalis, supra.*

Id., 546 N.W.2d at 667 (23a).

The prosecution appealed to the Michigan Supreme Court, and that court reversed the decision of the Court of Appeals and reinstated Respondent's first-degree murder conviction by a vote of four to three. *People v. Vincent,* 565 N.W.2d 629 (Mich. 1997) (26a). The majority summarized its decision:

> We hold that in order to qualify as a directed verdict of acquittal there must be either a clear statement in the record or a signed order of judgment articulating the reasons for granting or denying the motion so that it is evident that there has been a final resolution of some or all the factual elements of the offense charged. In this case, the judge's comments concerning the sufficiency of evidence regarding the issue of premeditation and deliberation lacked the requisite degree of clarity and specificity. In addition, there was no formal judgment or order entered on the record to indicate what the exact nature of the ruling was and why. Accordingly, we hold that the responses of the trial judge to the motions for directed verdicts never became final with respect to the charge of first-degree murder. Consequently, the continuation of the trial and subsequent conviction did not prejudice or violate the defendant's constitutional rights.

Id., 565 N.W.2d at 636 (42a)

In so holding, the majority relied heavily on *State v. Collins,* 771 P.2d 350 (Wash. 1989), for the proposition that:

> A judge's thinking process should not have final or binding effect until formally incorporated into the findings, conclusions, or judgment. This concept finds support in our court rules. [Mich. Court Rules] 2.602(A) requires that judgments and orders be "in writing, signed by the court and dated with the date they are signed." None of the indicia of formality associated with final judgments are present in the trial judge's comments at issue here. There was no statement in the record that an order or judgment was being entered at all. "Okay" does not equate with "It is so ordered."

Vincent, 565 N.W.2d at 635 (40a).

In a footnote, the majority explained that "Factors that might be considered in evaluating finality, in addition to a clear statement in the record or a signed order, might also include an instruction to the jury that a charge or element of the charge has been dismissed by the judge *or that a docket entry has been made reflecting the trial court's action.*" *Id.*, 565 N.W.2d at 635

n. 9 (42a) (emphasis added). Nowhere did the majority acknowledge that a docket entry reflecting the trial judge's action had been made in this case.

Having concluded that the trial judge had not granted a directed verdict, the Michigan Supreme Court majority did not reach the Michigan Court of Appeals' holding that a trial judge cannot constitutionally reverse a grant of directed verdict later in the trial. However, the majority agreed, after a discussion of *Smalis*, that "characterizing the court's comments as a directed verdict would compel us to overturn the defendant's convictions." *Id.*, 565 N.W.2d at 633 (35a).

Three justices dissented. The dissenters concluded that the decisions of this Court compelled the conclusion that the trial judge had actually terminated Respondent's jeopardy on the first-degree murder charge by granting the motion for a directed verdict. *Id.* 565 N.W.2d at 639 (Cavanagh, J., dissenting) (42a).

Respondent then filed a motion for reconsideration in the Michigan Supreme Court, pointing out that a docket entry had indeed been made reflecting the trial judge's decision to grant the directed verdict motion on the first-degree murder count. The Michigan Supreme Court denied reconsideration, *People v. Vincent*, 456 Mich. 1201 (1997), and this Court subsequently denied Respondent's petition for a writ of certiorari. *Vincent v. Michigan*, 522 U.S. 972 (1997).

Proceedings On Habeas Corpus

Respondent then filed a timely petition for writ of habeas corpus in the district court. The district court granted the writ on November 3, 2000 (78a). The district court held that since

the trial judge's statements and orders were undisputed, the question of whether those statements and orders amounted to a grant of directed verdict was a legal question not subject to the presumption of correctness (79a). The district court next held that the lower court cases cited by Petitioner for the proposition that a judge is free to reverse himself after granting a directed verdict were factually and legally distinct from Respondent's case because further proceedings had not occurred before the reversals of oral grants of directed verdicts in those cases, while in this case a formal docket entry had been made, two days had passed, and further proceedings had occurred before the reversal (79a-81a). Accordingly, the district court granted the writ and ordered that Michigan reduce Respondent's conviction to second-degree murder and conduct a resentencing on that charge (83a).

Petitioner appealed that judgment to the United States Court of Appeals for the Sixth Circuit, which unanimously affirmed. *Vincent v. Jones*, 292 F.3d 506 (6th Cir. 2002) (1a). Relying on this Court's decisions in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), and *Smalis v. Pennsylvania*, 476 U.S. 140, 144 (1986), the Sixth Circuit held that the question of whether the trial judge had acquitted Respondent was a question of law not subject to the presumption of correctness. *Vincent*, 292 F.3d at 510-511 (8a-10a). The Sixth Circuit next concluded that the trial judge's remarks clearly indicated that he had granted a directed verdict to Respondent on the first-degree murder court on March 31, 1992, and that the judge had formalized that grant by recording it in the official docket entries for that date. *Id.*, 292 F.3d at 511-512 (10a-12a).

On September 4, 2002, Justice Stevens granted Petitioner's application to file a petition for writ of certiorari more than 90 days after the Sixth Circuit's decision. On October 2, 2002, Petitioner filed the Petition for Writ of Certiorari in this Court.

ARGUMENT

I. The question of whether a trial court has granted a directed verdict for purposes of the Double Jeopardy Clause is a legal question not subject to the presumption of correctness, and the Sixth Circuit correctly concluded that the trial court had granted a directed verdict.

Petitioner first argues that the Sixth Circuit and the district court erred in refusing to defer to the Michigan Supreme Court's conclusion that the trial court had not granted a directed verdict to Respondent. Petition for Writ of Certiorari at 5-9. According to Petitioner, the Michigan Supreme Court's conclusion is a factual finding subject to the presumption of correctness on habeas corpus review.

Petitioner's argument is directly foreclosed by this Court's decisions in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), and *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). In *Smalis*, this Court rejected the prosecutor's claim that it was bound by the Pennsylvania Supreme Court's characterization of the trial judge's ruling in that case:

> [J]ust as "the trial judge's characterization of his own action cannot control the classification of the action under the Double Jeopardy Clause," *so too the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.*

Id., 476 U.S. at 144 n. 5 (emphasis added; internal brackets deleted; quoting *United States v. Scott*, 437 U.S. 82, 96 (1978)); *see also Martin Linen Supply*, 430 U.S. at 571 n. 9 ("The Court must inquire whether the ruling in (defendant's) favor was actually an 'acquittal' even though the District Court characterized it otherwise").

The question of whether the judge actually granted a directed verdict of acquittal for purposes of the Double Jeopardy Clause is manifestly not a "factual finding" subject to a

presumption of correctness. It is a legal question that the federal courts must review independent of the label that state courts have attached to the judge's action. *Smalis*, 476 U.S. at 144 n. 5. Petitioner cites no authority to the contrary, and there is none.

Petitioner does not actually argue in this Court the substantive question of whether the trial court did grant a directed verdict to Respondent on the first-degree murder count. In any event, the Sixth Circuit's conclusion that the trial court did grant a directed verdict is clearly correct and would still be correct even if the presumption of correctness did apply to the Michigan Supreme Court's decision.

On March 31, 1992, at the conclusion of the prosecution's case, the trial court specifically found that the prosecution had failed to prove premeditation and deliberation, essential element of first-degree premeditated murder and, therefore, the appropriate charge was second-degree murder. The trial court then recorded this grant of directed verdict in the court's official docket entries. The trial court itself later repeatedly referred to what it had done as "a ruling," and also explained that it had "granted a motion[.]" *See Vincent*, 292 F.3d at 512.

The Michigan Supreme Court's conclusion that none of this amounted to a grant of directed verdict was predicated on two erroneous beliefs. First, the Michigan Supreme Court reasoned that an oral acquittal not accompanied by a written order or some other formal trappings was insufficient to terminate jeopardy. *Vincent*, 565 N.W.2d at 635, 636 (38a-42a). This conclusion is, however, directly contrary to *United States v. Ball*, 163 U.S. 662, 671 (1896), in which this Court observed that "a verdict of acquittal, *although not followed by any judgment*, is a bar to a subsequent prosecution for the same offense." (Emphasis added).

Second, the Michigan Supreme Court expressly acknowledged that the formal trappings requirement it had just created for a grant of directed verdict could be satisfied if "*a docket entry has been made reflecting the trial court's action.*" *Vincent*, 565 N.W.2d at 635 n. 9 (42a) (emphasis added)). Inexplicably, however, the Michigan Supreme Court failed to acknowledge that precisely such a docket entry had been made in this case on March 31, 1992: "MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER TO 2ND DEGREE MURDER." *Vincent*, 292 F.3d at 512 (12a). Therefore, even under the criteria set forth by the Michigan Supreme Court, the trial judge in this case clearly granted a directed verdict to Respondent on the first-degree murder count.

II. The question of whether a trial court may reverse a grant of directed verdict later in the trial is not squarely presented by this case, the lower court cases cited by Petitioner are distinguishable, and this Court's decision in *Smalis* forecloses such an argument on the facts of this case.

Petitioner also presents a "right result, wrong reason" argument as to why habeas corpus should have been denied: even if the trial judge did grant a directed verdict, the judge was free to revisit that decision later in the trial. Petition for Writ of Certiorari at 9-13. This question was not squarely litigated during this habeas litigation because the only Michigan court to decide that question, the Michigan Court of Appeals, decided that question in Respondent's favor. *People v. Vincent*, 546 N.W.2d 662, 665-667 (Mich. Ct. App. 1996) (19a-22a). The Michigan Supreme Court did not reach this argument but indicated that it would have rejected it: "under federal precedent and our recent decision in *People v. Nix*, 556 N.W.2d 866 (Mich. 1996),

characterizing the court's comments as a directed verdict would compel us to overturn the defendant's convictions." *People v. Vincent*, 565 N.W.2d 629, 633 (Mich. 1997) (34a-35a) (citing *Smalis v. Pennsylvania*, 476 U.S. 140 (1986)).

Since the final state court decision did not adopt Petitioner's alternative argument and instead indicated that it would have rejected it, the federal courts did not squarely review that argument. Instead, as required by 28 U.S.C. § 2254(d), the federal courts focused on whether the Michigan Supreme Court's decision that the trial court had not granted a directed verdict was contrary to, or an unreasonable application of, this Court's precedents. For this reason, this case amounts to an exceedingly poor vehicle to review Petitioner's alternative argument.

In any event, that argument has been properly rejected by every state and federal judge to consider it. Each of those judges rejected the argument because it is contrary to *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), a decision which Petitioner neglects to cite in its Petition for Writ of Certiorari.

The Michigan Court of Appeals unanimously held, relying on *Smalis*, that "the court's subsequent reversal of its decision resulted in post-acquittal fact-finding by the jury when the jury was allowed to consider the first-degree murder charge in violation of defendant's double jeopardy rights." *Vincent*, 546 N.W.2d at 665-666 (19a). As discussed above, the Michigan Supreme Court majority did not directly reach this argument but, after citing and quoting *Smalis*, concluded that the trial judge could not reverse himself later in the trial if he had indeed granted a directed verdict. *Vincent*, 565 N.W.2d at 633 (34a-35a). Likewise, the district court cited *Smalis* to reject the claim that the trial judge is free to revisit a directed verdict grant later in the

trial (80a). Finally, the Sixth Circuit also relied on *Smalis* for this proposition. *Vincent*, 292 F.3d at 511 (9a).

Despite the fact that each court to consider Petitioner's argument has relied on *Smalis* to reject it, Petitioner does not even mention *Smalis*. Instead, Petitioner relies on several lower court decisions, but not one of those decisions applies or even cites *Smalis*, all of those decisions have obvious and important factual distinctions from this case and from *Smalis*, and most of those decisions do not actually support Petitioner's argument at all.

In *Smalis*, this Court unanimously held that after a grant of a directed verdict, the Double Jeopardy Clause *bars not only a new trial on the acquitted count but also a continuation of the same trial on that count*:

> The Commonwealth argues that its appeal is nonetheless permissible under *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), because resumption of petitioners' bench trial following a reversal on appeal would simply constitute "continuing jeopardy." But *Lydon* teaches that "[a]cquittals, unlike convictions, terminate the initial jeopardy." 466 U.S. at 308. *Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause. Arizona v. Rumsey*, 467 U.S. 203, 211-212 (1984).
>
> When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him. The Superior Court was correct, therefore, in holding that the Double Jeopardy Clause bars a post-acquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged." [*United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977)].

Smalis, 476 U.S. at 145-146 (emphasis added; footnote and citation omitted).

It follows immediately from *Smalis* that a grant of directed verdict cannot be reversed later in the trial because that "reversal would translate into further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged." *Id.*; *see, e.g., United States v. Blount*, 34 F.3d 865, 868-869 (9th Cir. 1994) (oral grant of directed verdict terminated jeopardy so as to preclude court's reconsideration the following day); *Brooks v. State*, 827 S.W.2d 119, 121-123 (Ark. 1992) (oral grant of directed verdict terminated jeopardy and precluded later reconsideration); *Lowe v. State*, 744 P.2d 856, 856-858 (Kan. 1987) (jeopardy terminated with oral grant of directed verdict so as to preclude reconsideration next day); *State v. Blacknall*, 672 A.2d 1132 (N.J. 1996) (same).

Petitioner's argument completely ignores *Smalis* and, instead, claims the existence of a split of lower court authority. In order to establish this claimed split, Petitioner cites three circuit court cases, *United States v. LoRusso*, 695 F.2d 45 (2nd Cir. 1982), *United States v. Baggett*, 251 F.3d 1087 (6th Cir. 2001), and *United States v. Byrne*, 203 F.3d 671 (9th Cir. 2000), and one state supreme court decision, *State v. Iovino*, 524 A.2d 557 (R.I. 1987). However, each of these cases is obviously distinguishable from this case. Further, none of these cases applies or even cites *Smalis*.

In *LoRusso*, a case decided several years before *Smalis*, the trial court granted a directed verdict as to one count, and the prosecutor "immediately" moved to substitute a lesser-included count, a motion which was granted before any further proceedings occurred. 695 F.2d at 50-51. In rejecting the defendants' double jeopardy argument, the Second Circuit manifestly relied on the reasoning, subsequently discredited in *Smalis*, that double jeopardy is not offended so long as a second trial is not required:

> [W]e see no reason why the trial court in the present case was not free before the entry of judgment to amend its own ruling *since it did so without subjecting the defendants to a second trial*. . . . In the circumstances of this case, where the court's oral decision was followed promptly by the modification providing for the reduction instead of the elimination of count 2, and where the reduced count could be, and was, submitted in the normal course of the trial *to the original jury*, we conclude that the action of the trial court did not violate principles of double jeopardy.

LoRusso, 695 F.2d at 54 (emphasis added; footnote omitted). As the district court observed in rejecting *LoRusso*, that decision's reliance on the rationale that the directed verdict could be reversed or amended so long as a second trial would not result is contrary to *Smalis* (80a). *LoRusso* is also factually distinct from this case in that the judge in *LoRusso* immediately modified his order before further proceedings occurred, while the judge in this case waited for Respondent to testify and to present his entire case before reversing himself.

Petitioner also cites *Byrne*, but, like all of the other cases Petitioner cites, *Byrne* does not mention or even cite *Smalis*. Instead, *Byrne* relies on *LoRusso*, without any recognition that the reasoning of that case was squarely rejected in *Smalis*. Further, *Byrne* is factually distinguishable in that the prosecutor "immediately" moved for reconsideration, and the trial judge "made it clear that her ruling was not final in the course of the same colloquy in which she announced the decision. . . . Because the district judge made clear, in the same colloquy in which she issued her ruling on the motion for acquittal, that the motion was subject to reconsideration, the Double Jeopardy Clause was not violated." 203 F.3d at 673, 674-675. Unlike *Byrne*, there was no immediate motion for reconsideration, and the judge in this case did not indicate that his decision was subject to reconsideration until the next day.

Petitioner essentially admits that *Baggett* is distinguishable from this case because the Sixth Circuit specifically found that the trial judge in *Baggett* did not grant a directed verdict during the trial but instead reserved decision until after the verdict. It is clear in this case, by contrast, that the judge in this case did not reserve his decision. In *Iovino*, the Rhode Island Supreme Court held that a trial judge could revisit his grant of directed verdict, but did not discuss or even cite *Smalis*.

What further distinguishes this case from all of the cases cited by Petitioner is that the trial judge in each of those cases made purely oral statements during the trial suggesting that an acquittal was appropriate. While an oral acquittal, "although not followed by any judgment," is sufficient for Double Jeopardy Clause purposes to preclude later reversal and reconsideration, *Ball*, 163 U.S. at 671, all of the cases certainly recognize that jeopardy terminates when the oral grant is reduced to writing. In this case, of course, the trial judge did reduce his grant of directed verdict to writing by recording it in the formal docket entries for March 31, 1992.

Petitioner's failure to discuss the effect of this docket entry is telling. Petitioner does not and cannot cite any cases in which such a directed verdict was formally granted and recorded but later reversed after further trial proceedings had been held. Petitioner cannot cite any such cases because such a procedure would obviously violate *Smalis*.

In short, there is no split of authority relevant to the facts of this case. The district court and the Sixth Circuit were correct to conclude that Respondent's jeopardy on the first-degree murder count terminated when the trial court granted a directed verdict on that count on March 31, 1992, and that the trial court therefore violated Respondent's Double Jeopardy Clause rights by revoking that grant two days later after Respondent had testified and presented his case.

CONCLUSION

Therefore, Respondent Duyonn Andre Vincent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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